SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 19797

LYME LAND CONSERVATION TRUST, INC. AND
GEORGE JEPSEN, ATTORNEY GENERAL OF CONNECTICUT
PLAINTIFFS-APPELLEES

v.

BEVERLY PLATNER
DEFENDANT-APPELLANT

BRIEF OF THE PLAINTIFF-APPELLEE
WITH SEPARATELY BOUND APPENDIX PART ONE AND PART TWO

FOR THE PLAINTIFF-APPELLEE:

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COUNTERSTATEMENT OF THE FACTS AND PROCEEDINGS

This is an action brought by the Lyme Land Conservation Trust (the "Land Trust") to enforce the terms of a Declaration of Restrictive Covenants dated November 25, 1981 (the "Declaration") burdening the 17 acre Restricted Area of defendant-appellant, Mrs. Beverly Platner's ("defendant") property in Lyme, Connecticut. Defendant's Appendix, p. A214; hereinafter, "D.App., A214.") The Restricted Area comprises 17 acres of defendant's property surrounding the 4.4 acre Unrestricted Area on three sides. (D. App., A220.) It borders the Connecticut River on the west, Selden Creek on the south and Selden Cove on the east. (Id.) It consists generally of a ten acre field north and west of the house (the "Field") and a woodland area south of the house (the "Woodland"). (Id.)

The Land Trust's complaint alleges that defendant engaged in intensive residential landscaping activities throughout the Restricted Area that violated the provisions of the Declaration, as well as violating C.G.S. § 52-560a and C.G.S. § 47-42c. (D.App., A34, A492-93.) The complaint seeks mandatory injunctive relief requiring restoration of the Restricted Area to its prior condition, prohibitory injunctive relief, statutory damages and an award of the Land Trust's attorney's fees.

The trial court found the Declaration to be clear and unambiguous, and that defendant's landscaping activities had "caused great damage to the protected area's natural condition" and had "subvert[ed] and eviscerate[d] the clear purpose of the conservation restriction." (D.App., A121-22.) It specifically rejected defendant's claims of ambiguity, explaining that "words do not become ambiguous simply because lawyers and laymen contend for different meanings." (Id., quoting Downs v. National Casualty Company, 146 Conn. 490, 494-95 (1959).)

The court did note that there was a question as to the frequency of mowing permitted by the Declaration that might have been amenable to "some sort of declaratory ruling." (D.App., A122.) However, the court went onto find that "the violations are so clear that it is unnecessary for the court to do that, since the severity of the violations requires an order that the property subject to the conservation restriction be restored to the condition it was in at the time defendant acquired the property." (Id.) The court's order "extends to the extensive landscaping of all of the protected area, including (by way of example and not limitation) those portions . . . where literally tons of soil and sand have been placed . . ., to say nothing of the huge amounts of fertilizer used to install this overreaching landscaping project done, as the court has found, willfully." (Id.)

ARGUMENT

I. DEFENDANT'S LANDSCAPING ACTIVITIES VIOLATED THE CLEAR TERMS OF THE DECLARATION

Standard of Review: Plenary. As the Connecticut Supreme Court recently stated in NPC Offices, LLC v. Kowaleski, 320 Conn. 519 (2016), a servitude (such as the Declaration) is to be interpreted consistently with contract construction principles:

> "In construing a deed, a court must consider the language and terms of the instrument as a whole. . . . Our basic rule of construction is that recognition will be given to the expressed intention of the parties to a deed or other conveyance, and that it shall if possible, be so construed as to effectuate the intent of the parties. . . . In arriving at the intent expressed in the language used, however, it is always admissible to consider the situation of the parties and the circumstances connected with the transaction, and every part of the writing should be considered with the help of that evidence."

320 Conn. at 525 (internal quotation and citation omitted).

A. The Circumstances Connected with the Grant of the Declaration

In 1981 Paul Selden owned 66 Selden Road and wished to sell it as an approved building lot. (Plaintiff's Appendix, A391-93; hereinafter, "P.App., A391-93.") Because most of the property is an alluvial flood plain wetland, it is subject to regulation by the Town of Lyme's Inland Wetlands Commission (the "IWC"). (P.App., A392-95; D.App., A400.) In obtaining the required building permit from the IWC, Mr. Selden agreed to grant a conservation restriction to the Land Trust on most of the property. (P.App., A392-95.)

Mr. Selden's lawyer, Charles Tighe, prepared a draft of the Declaration. The only communications concerning the drafting and execution of the Declaration were written communications between Mr. Tighe and Mr. Arthur Howe, then President of the Land Trust. (P. App., A399-404.) By the time of the trial, Mr. Howe was deceased. Mr. Tighe, called at trial by defendant, testified extensively concerning the negotiating history of the Declaration. He provided a draft of the Declaration to Mr. Howe with a cover letter dated September 3, 1981. (P.App., A168-69.) The letter reflected the Lyme IWC's view that the alluvial flood plain wetland on the property was "ecologically sensitive" and that the "intensity of uses should be kept to the barest minimum," as well as Mr. Tighe's own view that compliance with the terms of the Declaration he had drafted would retain the Restricted Area in its "natural state." (P. App., A169.)[1]

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[1] Defendant cites Mr. Tighe's testimony that, while Mr. Howe asked for a few changes to the draft, he never requested a prohibition against residential landscaping types of activities, offering that "if he had been interested in any of these things, he would have told me . . . ." (Defendant's Brief, p. 2, hereinafter, "D.Br., at 2"; D. App., A414-417.) Defendant omits the trial court's comment on this testimony: "That may be a bit of a conclusion. . . . But thank you for volunteering." (D.App., A418.)

Defendant also called as a witness the Declaration's grantor, Mr. Selden, and asked him whether he wanted "to exclude residential landscaping" from the Restricted Area. (P.App., A396.) Mr. Selden responded "I didn't have any vision at all of there being landscaping or not landscaping or anything. I mean, the whole area is a very different area than it was 40 years ago." (P.App., A395-97.) Indeed, as Mr. Selden is clearly saying, there would have been no reason in 1981 to suppose that the 17 rural acres covered by the Declaration might someday be turned into a landscaped estate. In any event, the Declaration is clearly designed to prevent any such "intensity of uses."[2] (P. App., A168.)

B. The Terms of the Declaration

Consistently with Mr. Tighe's September 3, 1981 letter, the intentions of the parties are expressed in the Declaration's statement of its purpose as follows:

> "The purpose of these restrictive covenants is *to assure retention of the premises predominantly in their natural, scenic or open condition and in agricultural, farming, forest and open space use* . . . . Said restrictions are intended as 'conservation restrictions' as that term is defined in Section 47-42a of the Connecticut General Statutes."

(D.App., A216, emphasis added.) C.G.S. § 47-42a, referenced in this paragraph, defines the term "conservation restriction" in virtually identical language as a "limitation . . . to retain land or water areas predominately in their natural, scenic or open condition or in agricultural, farming, forest or open space use." (D.App., A492.) Accordingly, any construction of the language of the purpose clause of the Declaration is, perforce, a construction of the identical language in C.G.S. § 47-42a.

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[2] Defendant requests that if the Court finds the Declaration to be ambiguous, it remand the case to the trial court to hear parole evidence as to its meaning. (D.Br., at 22.) This is disingenuous as defendant had a full and fair opportunity at the trial to elicit all of the available evidence pertaining to the intent of the parties to the transaction.

C.G.S. § 52-560a gives further context to the term "open space" as used in C.G.S. § 47-42a (and thus in the Declaration) by defining encroachment upon such space to include, as relevant here, conducting "an activity that causes damage to or alteration to the land or vegetation or other features thereon, including, but not limited to . . . constructing roads [or] driveways . . ., cutting trees or other vegetation . . ., installing lawns . . . or depositing . . . materials . . . ." (D.App., A493.)

The construction of conservation restrictions granted pursuant to C.G.S. § 47-42a, et seq., presents, except for *dicta* in Southbury Land Trust, Inc. v. Andricovich, 59 Conn. App. 785 (2000), an issue of first impression and is an evolving issue nationally.[3] The defendant, citing dicta in this case, argues that even though the Declaration is a conservation restriction, it should be narrowly construed with any ambiguity resolved against the restriction. (D.Br. at 14.) We refer to the brief of co-plaintiff, the Attorney General of Connecticut (the "Attorney General") for the reasons why the dicta in Southbury should not be followed. (Attorney General's Brief, p. 11-14.)

In NPC Offices, the Court addressed servitudes generally, adopting the modern rule of construction advanced by the Restatement (Third) of Property:

> "The general principle that servitudes should be interpreted in favor of validity, in contrast to the old rule that favored construction in favor of free use of land, facilitates safeguarding the public interest in maintaining the social utility of land while minimizing legal disruption of private transactions. A similar role is played by the rule that where two or more reasonable interpretations of a servitude are possible, the one more consonant with public policy is to be preferred."

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[3] *See, e.g.*, Nancy A. McLaughlin, *Interpreting Conservation Easements*, PROBATE & PROPERTY MAGAZINE, Mar./Apr. 2015, at 30. (P.App., A198-203.)

NPC Offices, 320 Conn. 519, 527 (2016) (citing Restatement (Third) of Property, Servitudes Sec. 4.1, comment (a), p. 498 (2000).)

Connecticut is one of the most conservation-minded states in the country, having enacted a number of laws designed to enable, promote and protect conservation restrictions.[4] Indeed, paragraph 3.4 of the Declaration expressly states that the "restrictions... imposed are intended to implement the public policy expressed in Section 22a-1 of the Connecticut General Statutes, and are for 'public' and 'charitable' purposes. . . ." C.G.S. § 22a-1 declares that the public policy of Connecticut is "to conserve, improve and protect its natural resources and environment . . . ." (P.App., A446.)

As set forth in the brief of the Attorney General, particularly in light of Connecticut's strong public policy interest in conservation, the Declaration should be construed so as to accomplish its intended conservation purposes. (Attorney General's Brief, p. 11-15.)

As relevant to this action, and in furtherance of its purpose as set forth above, the Declaration contains the following "Restrictions" with respect to activities in the Restricted Area:

1.1 No . . . temporary or permanent structure will be constructed, placed or permitted to remain upon the Protected Areas.

1.2 No soil, loam, peat, sand, gravel or other mineral substance . . . will be placed, stored or permitted to remain thereon.

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[4] *See*, e.g., C.G.S. § 47-42a (enabling conservation organizations to acquire conservation restrictions and providing for their enforcement) (D.App., A492.); C.G.S. § 52-560a (defining encroachments on conserved land, granting the Attorney General the right to enforce them and giving courts discretion to award punitive damages for their violation) (D.App., A493.); C.G.S. § 22-26jj (providing matching funds to organizations to acquire and protect land through C.G.S. Chapter 422, which broadly seeks to preserve agricultural land in C.G.S. § 22-26aa) (P.App., A443-45.); C.G.S. § 47-42b (making principles of adverse possession inapplicable to conserved lands) (P.App., A447.).

1.3 No soil, loam, peat, sand, gravel, rock, mineral substance or other earth product or material shall be excavated or removed therefrom.

1.4 No trees, grasses or other vegetation thereon shall be cleared or otherwise destroyed.

1.5 No activities or uses shall be conducted thereon, which are detrimental to . . . wildlife or habitat preservation.

1.6 No . . . vehicles of any kind shall be operated thereon.

1.7 Except as may otherwise be necessary or appropriate, as determined by the Grantee, to carry out beneficial and selective non-commercial forestry practices, all woodland thereon shall be kept in a state of natural wilderness.

(D.App., A214-15.) There is no ambiguity in these definitive prohibitions, and the trial court correctly held that defendant violated them in multiple respects as detailed below. As is readily apparent, the Restrictions are designed to ensure that the purpose of the Declaration is accomplished – as relevant here, "to assure *retention* of the premises predominantly in their natural, scenic or open condition . . . ." (D.App., A216, at 3.3, emphasis added.) Indeed, compliance with such restrictions would necessarily preserve the Restricted Area in the same natural, scenic *and* open condition it was in at the time of the grant of the Declaration.

Similarly, the "Reservations," set forth in Section II of the Declaration, while permitting some specific limited activities in the Restricted Area, do not operate to vitiate the Restrictions or the purpose of the Declaration. Defendants argue that Mrs. Platner's residential landscaping activities are permitted by the Reservation that permits the Grantor:

> [T]o conduct and engage in the cultivation and harvesting of crops, flowers and hay; the planting of trees and shrubs and the mowing of grass; the grazing of livestock; and the construction and maintenance of fences necessary in connection therewith.

(D.App., A215 at 2.2.)[5] This Reservation is obviously intended to permit the use of the Restricted Area for "agricultural" and "farming" uses as specifically provided for in the Declaration's statement of purpose.[6] It constitutes no justification for defendant's intensive residential landscaping activities in the Restricted Area. Nowhere do the Reservations reserve the right to destroy "grasses and other vegetation" in order to residentially landscape the Restricted Area. Moreover, neither the Declaration nor Connecticut public policy evinces an interest in protecting or promoting residential landscaping.

In addition to the foregoing, the Land Trust adopts and endorses the arguments advanced by the Attorney General regarding the proper interpretation of the Declaration as applied to Defendant's activities in the Restricted Area.

C. Defendant's Violations of the Provisions of the Declaration.

Standard of Review: Defendant challenges many of the trial court's factual findings regarding her activities alleged to violate the Declaration. "To the extent that the defendant challenges the trial court's factual findings, we review such claims under our clearly erroneous standard of review. . . . A court's determination is clearly erroneous only in cases in which the record contains no evidence to support it, or in cases in which there is evidence, but the reviewing court is left with the definite and firm conviction that a mistake has been made." Diaz v. Manchester Memorial Hospital, 161 Conn. App. 787, 790-91

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[5] Defendant's counsel conceded at the trial that she was not engaged in the "cultivation and *harvesting* of... flowers" in the Restricted Area except to the extent that a "person harvests their flowers by looking at them" (P.App., A411-13, emphasis added.). The court found that none of her activities were for the purpose of "creat[ing] and maintain[ing] views and sightlines from the residential property" within the meaning of paragraph 2.1 of the Reservations. (D.App., A122.)

[6] As with land conservation, Connecticut has a strong public policy of protecting and promoting farming and farm land, as provided in C.G.S. §§ 22-26aa and 22-26jj. (P.App., A443-45.)

(2015); *see also*, Palkimas v. Fernandez, 159 Conn. App. 129, 133 (2015). Because the Court's interpretation and application of the Declaration is plenary, plaintiff discusses the facts constituting the alleged violations in detail below.

(1) The Condition of the Property at the Time Defendant Acquired It.

The map referenced in the Declaration describes the area north and west of the house in 1981 as an "open field and small brush" and the area south of the house as "large hardwood and shrubs." (D.App., A220.) The evidence at the trial established that an aerial photograph from 2007 (P.App., A25-26.) accurately depicted the property's condition when defendant bought it. (P.App., A245-49.) The prior owner of the property, Fleur Hahne Lawrence, testified that she maintained a small regularly mowed lawn within the Unrestricted Area in front of the house as shown in the aerial photograph (P.App., A250, referring to P.App., A25-26.); mowed the Field twice a year (D.App., A275.); had engaged in only the most minimal activities in the Woodland consisting of cutting down four or five trees chewed by beavers they were afraid would fall into Selden Creek (D.App., A276.); had an irrigation system within the Unrestricted Area near the house but no irrigation system extending into the Restricted Area near the house or in the Field (D.App., A277; P.App., A250.); and had not installed an artificial beach inland from the high tide mark of the Connecticut River. (D.App., A279.)

(2) The Land Trust's Stewardship of the Property

In the discharge of its stewardship obligations, Land Trust personnel conducted site monitoring visits to defendant's property on September 28 and November 13, 2007 (the "September and November 2007 Site Visits," respectively) during which they took

numerous photographs documenting the then condition of the Restricted Area.[7] Such personnel also prepared a memorandum documenting their observations and findings. (P.App., A77-81.) In addition, the Land Trust retained environmental consultant, Anthony Irving of Ecological and Environmental Consulting Services, Inc., to participate in the November 2007 Site Visit and to prepare a report of the "site conditions" within the Restricted Area at that time.[8] (P.App., A82-85.)

During the September 2007 Site Visit, Land Trust personnel identified encroachments in the Restricted Area in the vicinity of the house. Such encroachments included extending the residential lawn into the Restricted Area, installing an irrigation system in the newly expanded lawn, and creating a beach area inland from the river that, as Land Trust personnel observed at the time, "appear[ed] to have been made by removal of the native grasses and improved with sand brought in from off the property." (D.App., A232.)

The Land Trust's attorney, Frederick Gahagan, notified defendant's counsel in writing on October 3, 2009 of the nature and extent of these violations of the Declaration and demanded that they be remediated. (D.App., A231-34.)[9] There ensued a long running

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[7] Some of these photos were entered as full exhibits in the trial court, and can be found in Plaintiff's Appendix on pages A45-54 and A59-62.

[8] While no baseline report regarding the condition of the Restricted Area was prepared in 1981, these photographs, the site visit memorandum and the environmental consultant's report effectively constitute a detailed baseline report on the condition of the Restricted Area in 2007 before defendant's intensive landscaping activities in 2009.

[9] This letter, among other things, conveyed the Land Trust's position that mowing the Field is permitted "as part of bona-fide agricultural activity and, otherwise, on a more limited basis that preserves the natural resource and wildlife benefits of the meadow." (D.App., A231.) This position is not "contrary" to the one that Mr. Gahagan took on behalf of prior owners of the property as Defendant claims. (D.Br., 6.) In 1995 the Lyme IWC believed that the Field should be allowed to revert to forest. Mr. Gahagan wrote to the IWC to

dispute between the parties with respect to these alleged violations, but no aspect of the dispute was ever resolved. (D. App., A235-42, A246-62; P.App., A333-51.) During the summer and fall of 2009, while the dispute was ongoing, defendant undertook a massive residential landscaping project throughout the entirety of the Restricted Area that destroyed most its natural vegetation other than trees, as described below.

Thereafter, the Land Trust conducted a court-ordered site visit on July 30, 2013 (the "July 2013 Site Visit") at which Land Trust personnel took numerous photographs of the radically changed condition of the Restricted Area. (P.App., A55-58.)

(3) Defendant Installed Residential Lawn Turf in the Field, Destroying the Existing Field Grasses.

When defendant purchased the property, the Restricted Area north and west of the house was a ten acre natural Field. (P.App., A252 and A317.) The Field is now a highly manicured and treated residential lawn (called "turf" by landscapers) with extensive beds of exotic ornamental flowers and plants.[10] During this conversion, defendant's principal landscaper, Novak Brothers Landscaping ("Novak"), destroyed the natural field grasses and replaced them with residential lawn type grasses and landscaping. (P.App., A290.) The destruction of the existing field grasses was a violation of paragraph 1.4 of the Declaration providing that '[n]o trees, grasses or other vegetation thereon shall be cleared or otherwise destroyed." (D.App., A214.)

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contest that position, stating that "[m]owing the meadow periodically merely maintains it in the open state it has remained in for living memory." (P.App., A177.) Mr. Gahagan's clients, the stewards of the property at that time, agreed to limit mowing to twice a year. (D.App., A243.)

[10] The term "exotic" denotes a plant not found naturally in the landscape in question. (D.App., A377.)

The "before and after" photographs document the conversion of the Field into a lawn. In addition to the 2007 aerial photograph (P.App., A25-26.), plaintiffs introduced photographs of the Field prior to the 2009 landscaping project at trial. (P.App., A51-52, A63-64.) They also introduced photographs of the lawn and ornamental gardens as they existed in the Field at the time of the July 2013 Site Visit. (P.App., A27-32.)

Novak installed the lawn in the Field in part by dumping 37 truckloads of topsoil and fill in the Restricted Area. (P.App., A305-06.) This violated paragraph 1.2 of the Declaration providing that "no soil . . . or other mineral substance . . . will be placed, stored or permitted to remain thereon". (D.App., A214.) Defendant's brief claims that there was "no evidence as to where the topsoil was spread" and that "if it had been spread evenly over the field it would be 3/10 inch thick." (D.Br., 4, at n4.) In fact, however, there was photographic and testimonial evidence of *exactly* where the 37 truckloads were dumped in the Restricted Area.

Mr. Novak testified that the soil was dumped and spread in September 2007 "in the Restricted Area" along the "edge of the cedar grove . . . to north of the house." (P.App., A305-06.) In getting to the dump site, the dump trucks created a dirt road through the Restricted Area.[11] Operating dump trucks in the Restricted Area violated paragraph 1.6 of the Restrictions providing that "[n]o . . . vehicles of any kind shall be operated thereon." (D.App., A215.)

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[11] Mr. Novak testified about the dirt road, which is shown in a photograph taken during the September 28, 2007 Site Visit. (P.App., A311-12; A49-50.) The newly expanded lawn is shown to the right of the road in the photograph, and the red flags mark irrigation heads installed in the Restricted Area.

Novak then hydroseeded the deposited topsoil, thereby installing residential lawn and destroying the natural field grasses below the deposited topsoil. (P.App., A108-10, A285-87, A305-11.) Mr. Novak testified in response to questions on direct that the "objective of spreading topsoil and hydroseeding was to replace the then-existing grass with the new type of grass ... growing on top of it." (P.App., A287.)[12] Novak also used an identical soil deposit and hydroseeding process on the hillside to the west of the entrance to the property from Selden Road (the "Hillside"). (P.App., A268-71, 285-87.) The topsoil deposited and spread on the Hillside in preparation for hydroseeding is shown in the photograph at P.App., A33-34.[13]

To convert the rest of the Field into lawn, Novak used a slice seeder to under-plant the natural field grasses in October 2009 with 5,250 pounds of lawn type grass seeds. (P.App., A288-91.) In so doing Novak used 2,350 pounds of "Double Eagle Blend" grass seed (100% rye grass), 350 pounds of "Eagle Blend plus Blue" grass seed (75% rye and 25% bluegrass); and 2,550 pounds of Teammates Plus grass seed (70% fescues, 20% rye and 10% blue grass). (P.App., A134-35, A289-91.)[14] These are the types of grasses used in residential lawns. (P.App., A134-35, A289-90, A421.) In the years following its installation, Novak mowed the new lawn throughout the Field in a cross-hatched pattern

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[12] During the September 2007 Site Visit, Land Trust personnel observed and photographed the newly hydroseeded lawn north of the cedar grove. (P.App., A45-50; A308-11.)

[13] It is true that Novak used this same method to repair some flood damaged lawn near the driveway, a consequence of installing residential lawn in the lower elevations of a flood plain. (P.App., A251; D.App., A317-19.) However, the portions of the Field cited above were on the Hillside and near the house (some of the highest ground on the property) and never flooded.

[14] This translates to 3,122 pounds of rye, 1,785 pounds of fescue and 343 pounds of bluegrass seed.

every three to four days during the growing season at a cost of $1,050 per mow. (P.App., A43-44, A298-302.)[15]

Defendant also hired Paul Grace of Grace Property Management ("Mr. Grace") to chemically treat her new lawn in order to complete the conversion of the Field into a lawn and to maintain it as such thereafter. The day after Novak completed seeding, Mr. Grace fertilized the Field with 18-24-12 starter fertilizer.[16] (P.App., A156, A320-21.) Later that fall, he applied lime to the Field in order to adjust its pH for lawn grasses and 28-0-3 fertilizer to "strengthen its roots" (D.App., A325-326; P.App., A156.)

The next year (2010), Mr. Grace followed the following fertilizing schedule: April -- Dimension, a combination herbicide and 13-0-5 fertilizer (D.App., A327-29; P.App., A158.); June -- iron (5-10-3) "to give [the] lawn a nice green color" (D.App., A331; P.App., A160.); July through September -- three applications of 24-0-11 fertilizer "to keep the lawn healthy and growing" (D.App., A332-35; P.App., A162, A164-65.); and October -- an application of 34-3-11 fertilizer to "strengthen the roots" of the grass (D.App., A335-37; P.App., A166.) As an indication of scale, Mr. Grace charged the Platners $15,940 for these six fertilizer applications. (P.App., A158-66.)

In addition, during 2010 Mr. Grace applied herbicides to kill broad leaved forbs, including clover, throughout the Field on four occasions. (D.App., A329-37; P.App., A157-67.); fungicides on seven occasions (D.App., A329-37; P.App., A157-67.); and Cal Turf

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[15]Defendant's expert botanist, Michael Klein, hired for the restoration portion of trial, prepared an inventory of species of plants in the Field in 2015 and found that blue grass and two fescue grasses were three of the five dominant species in the field, with the other two being creeping bentgrass, and white clover. (P.App., A421-22, referencing A204.)

[16]The three numbers describe the characteristics of fertilizers and refer in order to percentages of nitrogen, phosphorous and potassium. (D.App., A325.)

lime and Merit grub control on one occasion each. (D.App., A329-37; P.App., A158, A160.) Again for scale, Mr. Grace charged the Platner's a total of $25,660 for these thirteen applications. (D.App., A329-37; P.App., A152-67.) Mr. Grace followed a similar lawn treatment regimen in subsequent years, except that he was able to cut back on the herbicides because the turf grass was so thick and healthy that it could "choke out the weeds." (D.App., A336.)

Plaintiffs' expert botanist, Glenn Dreyer, is the Executive Director of the Goodwin Niering Center for Conservation Biology and Environmental Studies at Connecticut College and the Director of the Connecticut College Arboretum. His expert report dated March 31, 2014 addressed the condition of the lawn in the Field at that time. (P.App., A170-75.) In his opinion, the Field had been converted from its state at the time Mrs. Platner acquired the property into a "few species of exotic turf lawn grasses." (P.App., A172.) He notes that "[s]uch turf dominated landscapes are sometimes described as 'chemically dependent' or 'industrial' since it is impossible to maintain a system with only 1-3 turf grass species without frequent additions of a variety of chemicals, such as lime" and "[f]ertilizers with high Nitrogen levels." (P.App., A172, A385.) Mr. Dreyer was further of the opinion, consistently with Mr. Novak's testimony, that the field grasses that were there when defendant acquired the property had been "destroyed by the installation of the lawn." (D.App., A379.) As noted, this destruction violated paragraph 1.4 of the Declaration as well as C.G.S. § 52-560a(a) which defines encroachment on conserved land as including "installing lawns." (D.App., A214, A493.)[17]

[17]Defendant's botanical expert did not testify during the trial, but only at the remediation hearing.

The trial court found that defendant had "installed turf" in the Field supported by a "golf course style sprinkler system." (D.App., A141.)

(4) Defendant Installed Exotic Ornamental Flower and Plant Beds in the Field

Novak created numerous sculpted garden beds in the Field. (P.App., A254-84.) These beds contain hundreds of exotic ornamental perennials and shrubs that, with minor exceptions, are not found in the natural landscape in Connecticut. (P.App., A386-87.) Novak cut rings around the bases of the cedar trees in the Field (the "Tree Rings") by removing and trucking away dump truck loads of natural field grasses and soil from around the bases of the trees. (P.App., A128-31, A292-93.) This violated sections 1.3 ("no soil . . . or other earth product . . . shall be excavated or removed therefrom") and 1.4 (prohibiting the destruction of "grasses or other vegetation") of the Declaration. (D.App., A214.)

The ornamental flower beds on the Hillside can be seen in photographs in the record. (P.App., A27-32, A37-38.) As the Novak invoices reflect, the planting on the Hillside occurred in late July and early August, 2009. (P.App., A118-27.) During this same period, Novak sold the Platners 1,155 exotic ornamental plants, sixty percent of which were planted in the Restricted Area. (Id.; P.App., A254-57.) Thus, some 700 exotic ornamentals costing approximately $26,500 were planted there. (P.App., A118-27.)

Novak began planting the Tree Rings in the Field in September 2009. (P.App., A272-84.) During this period, Novak sold the Platner's 1,170 exotic ornamental plants. (P.App., A128-31, A272-84.) Novak planted fifty percent of these, or some 585 exotic ornamental plants costing approximately $19,000, in the Tree Rings. (P.App., A128-31,

A272-73.) Photographs show Novak personnel at work planting the Tree Rings in the Restricted Area and the Tree Rings as installed. (P.App., A31-32, A35-38, A280-81.)[18]

(5) Defendant Installed an Irrigation System throughout the Field

In the service of maintaining this new landscape, defendant employed Golf Irrigation Services, Inc. to install a golf course style irrigation system throughout the Field, which is seen in operation at P.App., A41-42. (P.App., A302-04, A362-65.) This extensive irrigation system constitutes the installation of a "structure" in the Restricted Area within the meaning of paragraph 1.1 of the Declaration, and for that reason constitutes a further violation of its terms. Moreover, the entire purpose of the irrigation system is to water artificially, and thus to maintain, as Mr. Platner described them, "green and plush" residential lawns and gardens in the Field. (P.App., A365.) Its use for this purpose also violates the Declaration.[19]

(6) Defendant Destroyed the Natural Understory in the Woodland

Pursuant to paragraph 1.7 of the Declaration, the Woodland is to be maintained as a "natural wilderness." (D.App., A215.) When Mrs. Platner bought the property, the Woodland had been undisturbed and consisted of "mixed trees and bushes." (D.App., A276.) A photograph taken during the September 2007 Site Visit shows the Woodland before defendant began her extensive activities there. (P.App., A53-54, A344.)

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[18] Novak also sold the Platners 36,000 daffodils costing $26,000, and planted them individually throughout the Platners' property, including in the Restricted Area. (P.App., A137, A294-95.) The photograph at P.App., A39-40 shows some of the daffodils on the Hillside in the Restricted Area.

[19] Mr. Platner's claim that at the time his wife acquired the property an irrigation system near the house extended into the Restricted Area and that workmen had found some old irrigation pipes in the Field was at odds with the prior owner's testimony that the only irrigation system she knew of was near the house in the Unrestricted Area. (D.App., A277.) The credibility of this conflicting testimony was for the trial court to assess, for whatever relevance it might have.

On a number of occasions Novak personnel "picked up sticks," "cleaned" the woods and "raked" and "blew" leaves and sticks there, carting them off the property in dump trucks. (*See e.g.*, P.App., A112, A124, A139-41; D.App., A304-05.) Novak then "mowed" the woods that had been recently groomed (P.App., A139-41, A146; D.App., A304.) This activity is what accounts for the complete elimination of the understory in the Woodland. Indeed, the before-and-after photographs of the Woodland are striking.[20] As Mr. Dreyer testified, the Restricted Area in the Woodland is no longer a "natural landscape." (D.App., A380-84.)

Defendant claims that the Woodland's present condition is accounted for by her removal of exotic invasives in 2008 under IWC supervision.[21] This claim ignores the clear evidence regarding the native understory remaining in the Woodland after most of the invasive plants had been removed.

On May 10, 2008, Mr. Platner wrote to the IWC reporting on the removal of the exotic invasives. In his letter he states that "[a]s we speak, the underbrush [in the Woodland] is currently flourishing and coming in fast." (D.App., A263; P.App., A366-68.) He attached to his letter an extensive inventory dated May 9, 2008 prepared by Mr. Richard Snarski of the native shrubs and herbaceous plant species remaining in the Woodland after the removal of most of the exotic invasives. These included six species of native shrubs and 26 herbaceous plant species. (D.App., A264-66.) Mr. Snarski testified that he would

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[20] Compare P.App., A53-54 (a photograph taken during the September 2007 Site Visit before the extensive grooming activity) with P.App., A55-56 and A57-58 (photographs taken during the July 2013 Site Visit after the activity).

[21] The IWC had jurisdiction over the removal because many of the invasives were in the wetland. The Land Trust gave advanced approval for this removal because exotic invasive species are not natural in the Connecticut landscape and tend to crowd out native plants.

have expected these native plants, which were in the Woodland understory in May 2008, to remain in the Woodland today absent human intervention. (P.App., A405-07.)

The trial court's finding that defendant had "destroyed considerable vegetation" in the Woodland was thus supported by substantial evidence. (D.App., A141.) The removal of exotic invasives is not a defense as it is indisputable that Novak assiduously groomed the Woodland — removing even sticks and leaves — and that the entire extent of the Woodland was mowed. These mowing and grooming activities are utterly inconsistent with Declaration's requirement in paragraph 1.7 that the Woodland be kept as a "natural wilderness." (D.App., A215.) As such, these activities in and of themselves support the trial court's prohibitory injunction forbidding them in the future. (D.App., A141.)

(7) Defendant Installed an Artificial Beach in the Restricted Area

Defendant contests plaintiff's allegation, and the trial court's finding (D.App., A142.), that she installed an "artificial beach" on the river west of the house (the "Beach") in violation of paragraph 1.2 of the Declaration providing that "[n]o . . .sand . . . or other mineral substance . . . will be placed or permitted to remain" in the Restricted Area. (D.App., A214.) However, she ignores compelling evidence supporting the court's finding— and seriously mischaracterizes other evidence— in her attempt to support her position that she did not deposit sand on the beach.

For example, defendant's brief states that "[n]othing in the invoices of the landscapers indicated where the sand was used" (D.Br., 4, at n.5.) and that "the plaintiffs did not produce any evidence that the defendant spread the sand on the beach." (D.Br., 29.) In fact, however, the Novak invoices reflect that on August 3, 2007 Novak sold Mrs. Platner 22.5 tons of sand. (P.App., A106.) The labor item for that same day reads

"[w]eeded beach and spread sand, trimmed grapevine, backfilled bluestone walkway and trimmed dead wood." (Id., emphasis added.) The proximity of the words, "beach" and "spread sand," is powerful evidence from the invoice itself that the sand was dumped and "spread" on the beach.

Moreover, the before and after photographs of the beach area are clear evidence supporting the allegation that the 22.5 tons of sand was used to expand the Beach. The 2007 aerial photograph shows that the natural beach line along the Connecticut River was then undisturbed and that it supported natural grass cover. (P. App., A25-26.) Photographs taken during the November 2007 Site Visit show the beach three months after Novak sold the sand to Mrs. Platner. (P.App., A59-62.) They clearly show, in contrast to the earlier aerial photograph, an artificial beach bare of any grass, greatly expanded landward from the river's high tide line, lined with logs and surrounded by new turf lawn. (P.App., A358-61.) These photographs are compelling evidence that a large amount of imported sand must have been deposited there, as Land Trust personnel observed during the September 2007 Site Visit conducted two months after the sand sale.[22]

Defendant seeks to cast doubt on where the sand was used, quoting a small portion of Novak's testimony on this score for the proposition that the sand was not spread on the beach but used to backfill the bluestone walkway on the property. However, testimony omitted from defendant's brief (shown in italics below) demonstrates the Court's obvious incredulity and casts grave doubt on the credibility or reliability of Mr. Novak's testimony on this subject:

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[22] See discussion at p. 10-11, above.

THE COURT: So your testimony about the sand is what?
THE WITNESS: He's asking me if I put 22 ½ tons of sand on the beach.
THE COURT: Yes, and you said no.
THE WITNESS: Because [the labor item in the invoice] says backfilled bluestone walkway.
THE COURT: With 22 tons of sand . . .? How long is the walkway that takes 22 tons –
THE WITNESS: I don't even remember which walkway it is to be honest with you.

(D. App., A307.) After testifying further in response to the Court's questions that the sand would have filled five dump trucks, Mr. Novak concluded his testimony on this topic as follows:

> *Q. Mr. Novak, what does this item – weeded beach and spread sand – refer to?*
> *A. It says weeded beach and spread sand, trimmed grapevine, backfilled bluestone walkway and trimmed deadwood. John, I don't remember this. I mean, I can't – I'm just telling you what I'm reading; whatever it says, it says.*

(D.App., A308.)

The idea that the sand was used to backfill the bluestone walkway is incredible on its face. The bluestone walkway on the property was only about 75 feet long and no more than four feet wide. (P.App., A176, A372-84.) Mr. Platner sought to address this obvious disconnect by testifying, although he was not there when the sand was deposited and used (D.App., A363.), that he had a "general idea" what Mr. Novak did with the 22.5 tons of sand:

> Q. Okay, well, what is your general idea?
> A. My general idea is that behind the house – and the house is a little over 200 feet in length; it's a big, long – we call it the big, long, white house – we had hired a stone mason to redo the whole patio. . . . [I]t's a very big patio – we had that patio reconstructed. And in the process of the work, the stonemason frequently would give direction to the Novak Brothers for their services, and so they would bring in, I think, some sand, I think. . . . [S]o I believe the sand was requested by the stonemasons."

(D.App., A361-62.) Mr. Platner's testimony on this score is certainly no more than speculation.[23] Defendant evidently seeks to harmonize the testimony of Messrs. Novak and Platner by stating that "Mr. Novak testified the sand was used to backfill the blue stone *patio."* (D.Br., 4, emphasis added.) But Mr. Novak never mentioned backfilling a patio.

The trial court, weighing the clear invoice language and the compelling photographic evidence against the vague and conflicting testimony of Messrs. Novak and Platner, found that defendant had created the "artificial beach" in the Restricted Area by dumping 22.5 tons of sand there in violation of paragraph 1.2 of the Declaration. (D.App., A142.)

(8) Defendant Relocated Her Driveway over the Field in the Restricted Area

Over the Land Trust's objections, defendant also intentionally rerouted her driveway over a portion of the Restricted Area. This violated multiple Restrictions in the Declaration, including paragraphs 1.2, 1.4 and 1.6. (D.App., A214-15.) Defendant admitted that the new driveway encroached on the Restricted Area (D.App., A77 at Answer paragraph 10(a).), and the trial court found it to be a violation of the Declaration, stating that "[t]here is no question as to the impropriety of this encroachment. . . ." (D.App., A186.) As the remedy

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[23] Defendant's expert, Mr. Klein, testified that 22.5 tons of sand spread evenly would have added only about an inch in depth to a beach measuring 50 x 150 feet. (D.App., A477.) But the photographic evidence demonstrates that these are not the actual dimensions of the beach. Mr. Klein did not "examine" the beach but assumed these were the dimensions because he had heard testimony that the Unrestricted Area is "essentially the same north/south [150 foot] dimension as the house and the beach has been described as in front of the house." (D.App., A477) In fact, the length of the beach is clearly a fraction of the length of the house and, being generous, measures no more than about 40 x 75 feet, or about 3,000 square feet, as the photograph at P.App., A59-60 and an aerial photograph at a scale of 1" = 150', supplied by Mr. Klein himself and found at P.App., A228, clearly show.

for the encroachment, the trial court ordered defendant to relocate the driveway outside the Restricted Area and restore the Area to its former condition. (D.App., A186.)[24]

II. THE RESTORATION PLAN ORDERED BY THE TRIAL COURT WAS WITHIN THE COURT'S AUTHORITY PURSUANT TO THE DECLARATION, C.G.S. §§ 47-42c AND 52-560a.

After the trial, the trial court held a hearing to determine the precise restoration measures to be taken with respect to the Restricted Area (the "Restoration Hearing"). The parties presented evidence and expert testimony regarding appropriate measures to remediate the defendant's various encroachments.

A. The Trial Court Had Authority to Order the Restoration.

Standard of review: Determining the court's authority to act pursuant to a statute is a question of statutory interpretation over which review is plenary. Fairchild Heights Residents Ass'n, Inc. v. Fairchild Heights, Inc., 310 Conn. 797, 808-09 (2014).

The restoration plan ordered by the trial court was within its authority granted by paragraph 3.5 of the Declaration (D.App., A216.) and by C.G.S. §§ 47-42c and 52-560a. (D.App., A492-93.) These sources direct the court to use its equitable powers to enforce the conservation restriction, including ordering the defendant to restore the land to its condition prior to the encroachment and any other equitable relief the court deems appropriate under the circumstances. When presented with a violation of a restrictive covenant, "the court is obligated to enforce the covenant... to have [the] property restored to its original condition even though the wrongdoer would thereby suffer great loss." Gino's

[24] While this appeal was pending, the Land Trust reached agreement with defendant to swap a portion of the Unrestricted Area for the portion of the Restricted Area encroached upon by the driveway, not wishing the further disruption of the Restricted Area that would be entailed by bringing in heavy machinery to relocate the driveway. (D.App., A191.)

Pizza of East Hartford, Inc. v. Kaplan, 193 Conn. 135, 139 (1984) (internal citations and quotation marks omitted); see also C.G.S. § 52-560a. Nothing in the trial court's remediation order exceeds this grant of power.

B. The Restoration Plan Was Supported by Sufficient Evidence.

The parties presented voluminous, and at times conflicting, expert testimony as to the condition of the Restricted Area at the time of the defendant's purchase, as well as of the steps necessary to restore it. "The credibility of expert witnesses and the weight to be given to their testimony . . . is determined by the trier of fact. . . . It is well settled that the trier of fact can disbelieve any or all of the evidence proffered . . . including expert testimony, and can construe such evidence in a manner different from the parties' assertions." State v. Fernandez, 76 Conn. App. 183, 193 (2003).

The trial court rendered its findings and orders from the bench followed by written orders generally memorializing its findings and conclusions. In this case the trial court's factual findings are complete but general in nature, and defendant has not sought an articulation of the evidentiary basis for such findings. A trial court need not "discuss the merits of each claim, or articulate its reasoning for finding probable cause with regard to those claims, we presume that the trial court acted properly and considered all of the evidence before it." TES Franchising, LLC v. Feldman, 286 Conn. 132, 142 (2008). See also, Bank of Boston v. Avon Meadow Associates, 40 Conn. App. 536, 543, cert. denied, 237 Conn. 905 (1996); Doe v. Rapoport, 80 Conn. App. 111, 116 (2003); Curran v. Kroll, 303 Conn. 845, 860 n.9 (2012).

The trial court's factual findings and order requiring specific restoration measures were amply supported by the evidence and certainly not clearly erroneous.

(1) Restoration of the Field

Both plaintiff's and defendant's botanical experts agreed on certain steps necessary to restore the Field to its condition in 2007. Defendant's expert, Mr. Klein, testified it would require the Platners to "leave [the Field] like it is, mow it twice a year, don't irrigate it and don't fertilize it." (P.App., A427-28.)[25] However, the parties' experts disagreed on whether such restoration would also require the reintroduction of diverse species of native and non-native grasses and forbs.

Plaintiff's botanical expert, Glenn Dreyer, addressed the condition of Mrs. Platner's property at the time she acquired it. In his opinion, the Field "would have been dominated by native warm season and naturalized non-native grass species with lesser amounts of typical 'old field' forbs (broad leaved plants) including a number of species of goldenrods, asters and other wildflowers common [to] this area." (P.App., A171.) He was further of the opinion that the "warm season grasses little bluestem (*Schizachyrium scoparius*), broom-sedge (*Andropogon virginicus*) and switch grass (*Panicum virgatum*) were likely the dominant species" and that "[c]ommon non-native hay and pasture grasses such as Timothy (*Phleum pretense*) and orchard grass (*Dactylis glomeratus*) were also likely present." (P.App., A171; D.App., A373-74.) As noted above, he is of the opinion that the Field today consists predominantly of residential lawn type grasses. (P.App., A172; D.App., A378-79.)

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[25] Unless mowed periodically, fields eventually revert to forests. To maintain a field as such, it should be mowed once or twice a year as both parties' experts recognized. The equipment normally used is a brush hog pulled behind a tractor, the same equipment Novak used to mow the Field during the years before it was converted into a lawn. (P.App., A253.)

Mr. Klein, however, opined that the grasses and forbs existing in the Field today are "substantially the same" cool-season grasses as existed there in 2007. (P.App., A426-27.) However, this opinion was given without knowledge of the most relevant facts. While defendant's counsel did show Mr. Klein the 2007 aerial photograph of the Field (P.App., A25-26.), they showed him none of the photographs showing the landscaping that had taken place in the Field. (P.App., A416.) Nor had they informed Mr. Klein that Novak had converted the Field into a lawn through hydroseeding and slice seeding it with 5,250 pounds of bluegrass, rye and fescue grass seeds. (P.App., A418-20.)[26] Worse, Mr. Klein testified that he had been shown Mr. Platner's testimony that "zero" bluegrass had been planted in the Field" (P.App., A432-33.), and that he had reviewed Mr. Novak's testimony that the seeding mix he had used in the Field was "100% rye grass." (P.App., A434.) Neither is true.[27] It is not surprising that Mr. Klein opined that the Field today is "substantially the same" as it was in 2007 given that he saw it only in its overgrown condition and was not informed of the steps taken to transform it into a lawn. (P.App., A426.)

One of Mr. Klein's firm's assignments was to prepare an inventory of the plants existing on the Platner property. (P.App., A204; D.App., A468-69.) While finding one example of a particular plant merited inclusion in the inventory totaling 51 species, the predominant species in the Field were found to be Kentucky bluegrass, red fescue, meadow fescue, creeping bentgrass and clover. (P.App., A204, A421-24.) This is, of course, what one would expect given that the first three are precisely the lawn type grasses

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[26] Mr. Klein visited the property only once post-trial when the Field was in an overgrown condition that Mr. Dreyer described as an "overgrown lawn." (D.App., A441.)

[27] See discussion at page 13-14, above.

that Novak planted there. Not being aware of this, Mr. Klein's explanation for bluegrass being one of the dominant grasses in the Field was that "blue grass has been used in lawns . . . in Connecticut for decades" and "its seed spreads through wind and through the actions of animals and so forth. . . ." (P.App., A434.)

Plaintiffs' and defendant's experts were in substantial agreement as to one methodology that could be employed to reintroduce diversity into the Field. Mr. Klein testified that in his opinion the best and least disruptive way to enhance the diversity of the grasses in the Field would be to plant "plugs of warm-season grasses or other types of cool-season grasses throughout the meadow." (P.App., A427-28.) He further testified that warm season grass plugs should be planted "18 inches or two feet" apart, and that cool-season grass plugs "might be closer together than that." (P.App., A429.) He testified moreover that he had prepared live plant plug planting plans for his clients that included "a list of the species to be used, the area to be covered, and either an estimate of the density or the number [of plugs] required." (P.App., A435.)

Subsequent to the Restoration Hearing, the trial court issued its Order dated July 17, 2015, stating that:

> "As to the fields subject to the conservation restriction, the court is not inclined to order the bulldozing of the recently installed turf supporting the ornamental lawn with a golf-course style sprinkler system. Rather the court will order that portion to be planted with "plugs" or similar devises to restore the lawn to a natural state that will not require chemicals to be placed upon these wetlands."

(D.App., A141.) Accordingly, the court directed both parties to prepare planting plans along the lines Mr. Klein had suggested. Plaintiff retained one of the foremost meadow remediation experts in the country, Larry Weaner of Larry Weaner Landscape Associates, to work with Mr. Dreyer in preparing its planting plan. (P.App., A179-89.) The plan applies

to the entire Field and follows the court's direction that diversity be restored using live plant plugs and Mr. Klein's view that such plugs should be planted two feet apart. (P.App., A187.) The grasses, forbs and wildflowers chosen are appropriate for the soil conditions plaintiffs' experts found after conducting post trial soil sampling in five different sections of the Field. (P.App., A182-83.) The purpose of the plan is not to "improve" the Field as compared to its condition in 2007, but rather, as the plan itself states, to "restore" the Protected Areas to that condition. Defendant also prepared a planting plan. However, her plan is limited to wildflowers alone and provides for planting them in several beds comprising only fifteen percent of the Field. (P.App., A197, see Plant Notes #1; A439-41.)

After holding another hearing to consider the Parties' respective planting plans, the trial court ordered defendant to "restore" the Field using plaintiffs' plan. (D.App., A186.) He had previously ordered that defendant "remove the heads" from the irrigation system, remove the ornamental planting beds from the Field and conduct no irrigation or chemical treatment activities in the Restricted Area. (D.App., A141, A186.)

Defendant argues that there is "no evidentiary basis for the condition of the property as it was in 2007," (D.Br., 26.) and thus no basis for an order directing its remediation. But this claim is belied by Mr. Dreyer's expert report and testimony. Defendant's actions have made it infeasible to determine *exactly* what grasses and forbs populated the Field and in what proportions, the evidence is incontrovertible that they were not the residential lawn type grasses there now. Mr. Dreyer amply supported and defended his opinion regarding the condition of the property in 2007, and the trial court was entitled to credit it. (*See* Loring v. Planning and Zoning Com'n of Town of North Haven, 287 Conn. 746, 759 950, A.2d 949

(2008) (a trial court can only reject the testimony of an expert if there is some basis in the record to find the expert's opinion unworthy of belief).)

The trial court, by adopting the plaintiff's planting plan, ordered restoration of the Field through the reintroduction of native and non-native warm and cool-season field grasses. The need for such species diversification is amply supported by Mr. Dreyer's expert opinion. It is noteworthy that Mr. Klein agreed that if additional diversity is to be introduced into the Field, it should include both warm-season and cool-season grasses and native and non-native species. (P.App., A427-28.)

Defendant incorrectly contends that the trial court exceeded its authority by ordering a restoration plan that would improve the conservation value of the Field beyond its original condition. This characterization is based upon Mr. Dreyer's report and testimony concerning the restoration plan he had *originally* proposed. That plan called for removing the existing turf as sod and seeding the remaining bare field exclusively with native grasses and forbs which defendant attacked as "improving" the Field that had included non-native species. (D.Br., 24-25.) Because the trial court did not order remediation through his plan, the defendant's assertion has no basis in fact.

Even if the restoration order would improve the conservation values of the Field over those existing in 2007, such an order would remain within the authority of the court. The defendant's position ignores the plain language of C.G.S. § 52-560a(c), which provides the court with the authority to enter such "injunctive or equitable relief as the court deems appropriate," in addition to ordering restoration. (D.App., A493.)

(2) The Restoration of the Woodland

Finding that defendant had "destroyed considerable vegetation" in the Woodland, the trial court ordered "that all mowing and landscaping activity be discontinued to permit the Woodland to return to its natural condition," permitted "selective removal of invasive species on a plant by plant basis" and directed that "[f]uture plantings by defendant . . . will be approved on a case by case basis during the remediation period." (D.App., A141-42.) These remedies for the Woodland violations are entirely appropriate to restore the Woodland over time to the "natural wilderness" condition mandated by the Declaration.

(3) The Restoration of the Beach

As the remedy for this violation of the Declaration the trial court ordered the beach "to be remediated, and the logs installed in the area . . . to be removed." (D.App., A142.) The trial court has retained jurisdiction over the restoration process and if the parties need further guidance on such remediation, the trial court can provide it.

III. THE TRIAL COURT PROPERLY AWARDED DAMAGES PURSUANT TO GENERAL STATUTES § 52-560a(d).

Standard of Review: Abuse of Discretion. The trial court has broad discretion in determining whether damages are appropriate. Its decision will not be disturbed on appeal absent a clear abuse of discretion. Smith v. Snyder, 267 Conn. 456 (2004).

The court awarded the plaintiff $350,000 in damages pursuant to C.G.S. §52-560a(d) which provides in part, "the court may award damages of up to five times the cost of restoration or statutory damages of up to five thousand dollars." (D.App., A493.)

The trial court determined that restoration of the Field would cost approximately $100,000. The court imposed a multiple of 3.5 to reach a total damages award of $350,000. "It is the order of the court that this damage award be a fixed sum (or if the statute requires

a precise multiplier, such a multiplier that will result in damages of $350,000.00.)" (D.App., A122.) The restoration cost was based on the plaintiff's expert, Glenn Dreyer's, testimony that one way to restore the Field would be to remove the existing vegetation and to replant it at a cost of $90,000 to $100,000. (D.App., A389.)

Defendant ignored the plaintiff's damage testimony entirely at the trial. Her counsel chose not to ask a single question on the topic during her cross-examination of Mr. Dreyer. Nor did her counsel present any evidence at any stage of the trial what the cost of any restoration plan would be.

The defendant had an opportunity to challenge the court's damage award and to address the issue of the cost of the restoration based on plaintiff's planting plan at the continued Remediation Hearing held on July 14 and 15, 2015. She failed to do so. Nor did she challenge the damage award on the basis that it applied to a different restoration plan than was adopted by the court. "[O]nly in the most exceptional circumstances can and will this court consider a claim . . . that has not been raised and decided in the trial court." Perez-Dickson v. Bridgeport, 304 Conn. 483, 498-99 (2012) (Internal quotation marks omitted). "The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial – after it is too late for the trial or the opposing party to address the claim – would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." State v. Danzell, 282 Conn. 709, 720 (2007) (Internal quotation marks omitted).

If this Court finds that the trial court abused its discretion in its award of statutory damages, the matter should be remanded for the trial court to determine the actual costs to restore the Restricted Area pursuant to the restoration plan it has ordered.

IV. THE TRIAL COURT PROPERLY AWARDED ATTORNEY'S FEES PURSUANT TO THE CONSERVATION RESTRICTION AND GENERAL STATUTES § 52-560a(c)

Standard of Review: Abuse of Discretion. (ACMAT Corporation v. Greater New York Mutual Insurance Company, 282 Conn. 576 (2007)).

The trial court awarded the plaintiff $300,000 in attorney's fees and found that "the charges incurred in connection with the Inland Wetlands Commission and the early, declaratory judgment portion of this case are within statutory and conservation restriction authorizations for an award of counsel fees." (D.App., A123.)[28] The defendant's objection is limited to that portion of the plaintiff's attorney's fees incurred in the declaratory judgment action and the administrative proceedings before the Inland Wetland Commission, claiming they were "essentially separate" proceedings and were not resolved in the plaintiff's favor. Those fees total just under $30,000, with $12,000 in round numbers attributable to the declaratory judgment action and $18,000 to the Inland Wetland Commission proceedings. (D.App., A213a -213b.)

The abuse of discretion standard of review "applies to the amount of fees awarded...and also the trial court's determination of the factual predicate justifying the award. . . . [A]n appellate court] will make every reasonable presumption in favor of upholding the trial court's ruling and only upset it for a manifest abuse of discretion...[Thus] review of such rulings is limited to questions of whether the trial court correctly applied the

[28] In 2009, the defendant filed an application before the Lyme IWC to relocate her driveway over a portion of the Restricted Area. The Land Trust appeared and objected. The Commission approved the defendant's application. The Land Trust appealed to the Superior Court and withdrew its appeal as moot after the defendant relocated her driveway. (D.App., A123.)

law and reasonably could have reached the conclusion that it did." Whitney v. J.M. Scott Associates, Inc., 164 Conn.App. 420, 2016 WL 1317681 at 7.

Section 3.6 of the Declaration provides "if any action, *whether at law or in equity*, shall be brought to enforce the covenant arising pursuant to this declaration *or to prevent an anticipatory breach thereof*, and if any relief is granted to the plaintiff in said action...the defendant...shall be obliged to pay all court costs and the reasonable attorney's fees..." (D.App., A216, emphasis added.) In addition, C.G.S. § 52-560a(c) provides that a court may award reasonable attorney's fees as damages for the encroachment onto conservation land. (D.App., A493.)

A. The Declaratory Judgment Action

As the trial court found, this action began as a declaratory judgment action in the fall of 2009. (D. App., A123.) When it became apparent after fruitless negotiations that defendant had no intention of honoring the terms of the Declaration, again as the trial court found, the Land Trust amended its complaint in the action, but only with respect to the relief sought. (Id.) The amended complaint contains nearly identical factual allegations, but alleges that defendant's activities in the Restricted Area constitute violations of the Declaration and seeks injunctive relief.[29]

Hence, the declaratory judgment action and this action are one and the same action. Attorney's fees attributable to the original form of the action are properly recoverable in the action in its amended form.

[29] Compare the original Complaint (P.App., A1-24.) with the Second Amended Complaint (D.App., A34.).

B. The Inland Wetland Proceeding

The trial court found that defendant applied to the IWC to relocate her driveway into the Restricted Area. The Land Trust appeared and objected before the Commission "to prevent an anticipatory breach" of the Declaration within the meaning of paragraph 3.6 of the instrument. (D.App., A44; A123.) Although the IWC ruled in defendant's favor, plaintiff has now prevailed in this action with respect to the same driveway relocation issue in the IWC hearing. Fees incurred in that action should be recoverable in this action alleging the same violation of the Declaration.

The trial court's legal basis for awarding attorney's fees is found in both the Declaration and C.G.S. § 52-560a(c). The facts supporting the plaintiff's attempts to enforce the Declaration and the anticipated breach thereof were proven at the trial, and the award should stand.

CONCLUSION

For any and all of the above reasons, the judgment of the trial court should be sustained and this appeal should be dismissed.

Respectfully submitted,

THE PLAINTIFF
LYME LAND CONSERVATION TRUST, INC.

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CERTIFICATION

Pursuant to Practice Book § 67-2(h), I hereby certify that: (1) the electronically submitted brief and appendices were emailed on July 13, 2016, to counsel of record listed below; and (2) that the brief and appendices do not contain any names or personally identifiable information that is prohibited from disclosure or that any such information has been redacted.

Pursuant to Practice Book § 67-2(i), I hereby certify that: (1) in compliance with Practice Book § 62-7, a copy of the foregoing brief and appendices were mailed, postage prepaid, to **the Honorable Joseph Q. Koletsky**, and the counsel of record listed below on July 13, 2016; (2) that the brief and appendices are true copies of the brief and appendices filed electronically pursuant to Practice Book § 67-2(g); (3) that the brief and appendices do not contain any names or personally identifiable information that is prohibited from disclosure or that any such information has been redacted; (4) and that the brief complies with all provisions of Practice Book § 67-2(i).

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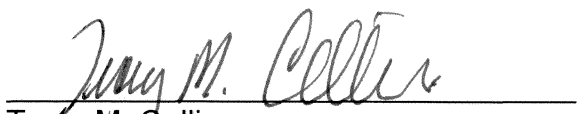

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